UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HUBERT DISTRIBUTORS, INC.

Respondent

and Case 7–CA–31719(6)

LOCAL 1038, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
AFL-CIO

Charging Party

Richard F. Czubaj, Esq.,
for the General Counsel.
J. Laevin Weiner, Esq.,
(Frank, Stefani, Haron and Weiner),
of Troy, Michigan, for the Respondent.
Judith A. Sale, Esq.,
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Canzano, P.C.), of Southfield, Michigan,
for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

Statement of the Case

IRA SANDRON. This matter, arises out of a compliance specification and notice of hearing issued on March 4, 2003,[1] against Hubert Distributors, Inc. (the Respondent), and a superseding compliance specification (the final specification) filed by the General Counsel at the conclusion of proceedings.[2]

Pursuant to notice, I conducted a trial in Detroit, Michigan, on June 17 to 20 and July 22 and 23, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

The General Counsel called Field Examiner Mark Baines, who had the most direct involvement in the preparation of the original backpay specification; and Greg Nowak, the Union's president. The General Counsel and the Union jointly called drivers its chief financial officer; employee Mike Lozano; and Mike Mrozinski, its delivery manager. All parties filed helpful posthearing briefs, which I have duly considered.

[1] All dates are in 2003 unless otherwise indicated.
[2] GC Exh. 20.

These proceedings stem from a November 8, 1996, Decision and Order of the Board in *Don Lee Distributor, Inc. et al.*, 322 NLRB 470 (1996), enfd. 145 F.3d 834 (6th Cir. 1998) (the order).[3] As detailed therein, the Respondent was a member of a multiemployer association, the Downriver, Detroit, Oakland, Macomb Wholesalers Association, Inc. (DDOM), comprised of beer distributors in the greater Detroit, Michigan metropolitan area. DDOM and the Union were parties to a collective-bargaining agreement, effective from August 17, 1987 to May 1, 1990.[4] The Respondent, along with five other employer-members of DDOM, resigned from the association and entered into a secret pact concerning how each of them would negotiate new, and ostensibly individual, contracts with the Union. On February 7, 1991, these employers, including the Respondent, unilaterally implemented offers they had made to the Union that reflected their secret pact (the implementation).

The Board ordered the Respondent to rescind the entire February 7, 1991 implementation, including but not limited to the implementation of new classifications, and the elimination or reduction of hourly wage rates and holiday and vacation pay. The Respondent was further ordered to make whole all unit employees[5] for any loss of wages and benefits they suffered as a result of the unlawful changes. There is no dispute that the backpay period began on April 15, 1991 and ended on June 30, 1998.

Legal Parameters

Ordinarily, a statement of the applicable law logically follows findings of fact. However, here a determination of what facts are significant must be viewed in light of the governing legal standard for evaluating the General Counsel's calculations of backpay and other benefits.

The applicable legal precepts are well established. The objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices. *Alaska Pulp Corp.,* 326 NLRB 522, 523 (1998), citing *Phelps-Dodge Corp. v. NLRB*, 313 NLRB 177, 194 (1941). In seeking to objectively reconstruct backpay amounts as accurately as possible, the General Counsel may properly adopt elements from the suggested formulas of the parties. *Performance Friction Corporation*, 335 NLRB 1117 (2001), citing *Hill Transportation Co.*, 102 NLRB 1015, 1020 (1953).

As the Board recognized in *Alaska Pulp Corp.*, supra at 523, "Determining what would have happened absent a respondent's unfair labor practices . . . is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat different result. Accordingly, the General Counsel is allowed a wide discretion in picking a formula." See also, *Moran Printing*, 330 NLRB 376 at 376-377

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[3] GC Exh. 1(a) & (b), respectively.

[4] Jt. Exh. 1.

[5] All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by the Respondent at its Pontiac, Michigan facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

(1999). The Region has the burden of establishing only that the gross backpay amounts contained in a backpay specification are a reasonable and not arbitrary approximation. *Virginia Electric Co v. NLRB*, 219 U.S. 532, 544 (1984); *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Atlantic Limousine*, 328 NLRB 257, 258 (1999); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986).

Once the General Counsel has arrived at such amounts, the burden shifts to the respondent to establish affirmative defenses that would mitigate its backpay liability. *Atlantic Limousine*, supra at 258; *Hacienda Hotel & Casino*, supra at 603. Any uncertainties in the amount of backpay due should be resolved in favor of the backpay claimant rather than the respondent, who is responsible for the underlying unfair labor practices that have led to the uncertainties. *United Aircraft Corp.*, 204 NLRB 1068 (1973); *Alaska Pulp Corp.*, supra at 522. Indeed, to hold otherwise would effectively punish backpay claimants for the respondent's illegal conduct against them.

Thus, the general overriding issue here is whether calculations contained in the General Counsel's final backpay specification should be deemed reasonable and therefore accepted, objections from the Respondent and the Union to certain portions thereof notwithstanding.
Analyzed in such context, this case is far less complex than the multitude of documents, the 6 days of hearing, the recriminations leveled back and forth throughout the course of proceedings, and the parties' briefs would suggest.

Before turning to specific areas where the Respondent or the Union disagree with the General Counsel's computations, I will address the Respondent's contention that the Region's alleged dilatory compliance investigation, its giving priority to other beer distributors that were also the subject of the order, and its otherwise poor handling of the compliance investigation, should result in a tolling of interest as of June 1, 1999, for employees to whom it owes compensation.

Although the Supreme Court has never clearly held that estoppel is unavailable against the Government, it has repeatedly shown a strong reluctance to find the Government estopped on the same terms as private litigators. *All Shores Radio Co.*, 286 NLRB 394, 398 (1987). For example, in *Schweiker v. Hansen*, 450 U.S. 785 (1981), the Court held that estoppel did not lie in a case where an employee of the Social Security Administration had given erroneous information, resulting in a claimant's failure to comply with a filing requirement.

Specifically in Board proceedings, It is settled law that delay in compliance matters by the Agency will not toll the accumulation of backpay owed to discriminatees, under the principle that they should not be penalized by the acts or omissions of the Government. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969); *Harding Glass Co.*, 337 NLRB 1116 (2002); *Unitog Rental Services,* 318 NLRB 880 (1995); *Carrothers Construction Co.*, 274 NLRB 762 (1985). As stated by the Supreme Court in *Rutter-Rex Mfg..*, above at 264–265, "Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrong doing employer . . . and the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers."

Consistent with this principle, the Board has specifically rejected arguments that the doctrine of laches should be applied to penalize discriminatees for the conduct of

Regional Offices in compliance matters. *Aroostock County Regional Opthamology Center*, 332 NLRB No. 164 (2001); *Carrothers Construction Co.*, *Smyth Mfg. Co.*, 277 NLRB 680 (1985). As the Board stated in *Aroostock County Regional Opthamology Center*, above at p.6, "The equitable defense of laches is generally not available in circumstances, like those presently before us, where public policy requires the vindication of the rights of the employees who have been the targets of an employer's unfair labor practices."

The fact that the delay may be substantial does not dictate a contrary result. For example, in *Aroostock Opthamology Center*, supra, and *Yorkaire, Inc.*, 328 NLRB 286 (1999), the Board rejected arguments that interest on backpay should be tolled where backpay specifications were not issued until over 3 years after circuit court orders. And, in *Harding Glass*, supra, the Board rejected the respondent's argument that the amended compliance specification should be dismissed because of the delay in excess of 2 years between the date when the original compliance specification issued and the date that the amended compliance specification.

Accordingly, even assuming arguendo that here the Region was solely responsible for the delay in issuing the original specification, that it was dilatory, and that it should have given more priority to this matter vis-à-vis other distributors which were found to have committed similar unfair labor practices, the Respondent should receive no benefit at the expense of the employees who suffered because of its illegal conduct.

Therefore, I find no merit whatsoever to the Respondent's arguments that backpay should be tolled because of the Region's delay in issuing the backpay specifications or other alleged deficiencies in investigation. I need not address, therefore, recriminations the Respondent made against the General Counsel and the Union, or counter–accusations leveled by the General Counsel and the Union against the Respondent, in terms of conduct during the compliance investigation and who was to blame for the lengthy process and the failure of the General Counsel to have in its possession full and complete records in a timely fashion.[6]

On the subject of delay, I feel compelled to state that, while I fully appreciate concerns that the backpay specification be as correct as possible, it is regrettable that the discriminatees, some of whom there is no dispute are owed tens of thousands of dollars, will have to wait to be made whole for well over a decade since they first suffered from the Respondent's unfair labor practices.

Issues

1. Whether the General Counsel erred in not accepting the Respondent's assertion that it is entitled to a "productivity credit," based on additional commissions it paid to presell drivers that would not have been paid under the DDOM contract.

2. Whether the General Counsel erred in not accepting the Respondent's assertion that three employees classified as bulk drivers should be treated as freight drivers and therefore not entitled to any commissions.

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[6] I note that over 300 employees in different classifications were involved and that the backpay period was for over 7 years.

3. Whether, as asserted by the Respondent, the General Counsel improperly computed holiday pay by calculating floating holiday pay at double-time rate rather than straight-time rate.

4. Whether, as contended by the Union, the General Counsel relied on insufficient documentation provided by the Respondent in computing medical reimbursement costs owed to certain discriminatees.

5. Whether, as contended by the Union, the General Counsel improperly gave the Respondent an offset for the voluntary payment it made to warehouse employees in November 2000.

6. Whether, as contended by the Respondent, the General Counsel improperly apportioned the voluntary payment between principal and interest, as opposed to treating it all as principal.

7. Whether, as contended by the Union, the General Counsel improperly gave the Respondent an offset for workers' compensation payments made to three employees. The Union secondarily argues that the General Counsel erroneously computed the offset amounts.

Facts

Based on the entire record, including the order, as affirmed by the Sixth Circuit Court of Appeals; testimony of witnesses and my observations of their demeanor; documents; and stipulations of the parties, I make the following findings of fact.

Prior to April 15, 1991, the Respondent employed employees in the following classifications contained in the expired DDOM agreement: drivers (driver-sold and presell), helpers (driver-sold and presell), forklift operators, and reclamation employees. It did not employ hand loaders, freight drivers, or local semi–drivers. Driver-sold drivers obtained sales on their routes and then delivered the product, whereas presell drivers delivered product that was actually sold the previous day. The Respondent had no bulk driver classification prior to April 15, 1991, but subsequently instituted such classification at the time of the implementation.

Prior to April 15, 1991, presell and driver-sold drivers received a base pay of $8.33 an hour, plus commission, and driver-sold helpers received $8.23 an hour, plus commission, with commissions based on the number of cases (bottles or cans) delivered.[7] Presell drivers received $.30 per case, driver-sold helpers $.155 per case, and presell driver helpers $.075 per case. Drivers, but not helpers, also received a commission for picking up empty cases. On April 15, 1991, the Respondent eliminated the base pay rates and instead placed employees in all these classifications wholly on commission.

Methodology Used by the General Counsel

[7]Jt. Exh. 1, article V.

Baines testified in detail regarding his preparation of the compliance specification, based on records and information he received from the Respondent and the Union. He reviewed thousands of pages of payroll records covering 7-plus years. He testified that because the Respondent furnished inadequate information to determine if a helper was assigned to a presell driver or driver-sold driver, the Region had to make certain assumptions. Initially, based on the average earnings of 14 drivers employed during the entire backpay period, he determined that the helpers had engaged more in presell than driver-sold activity and therefore estimated their commission as $.10 per case, weighted more heavily toward the higher presell commission rate. However, based on additional information provided by the Respondent shortly before the hearing, reflecting there were no driver-sold helpers, the General Counsel amended the specification to provide that helpers (for presell drivers) should receive a commission rate of $.0075 per case.

I. Productivity Credit

The expired contract provided that presell drivers earned a base rate of $8.33 and a commission of $.30 for each case they delivered, regardless of whether they had a helper. The contract also contained load limits on the maximum amount of cases a presell driver could deliver in a week. These load limits were strictly enforced, and neither the Respondent nor the employee could benefit from exceeding them.

The Respondent changed the compensation to commission only on April 15, 1991, at which time it also eliminated the load limit. Presell drivers were required to deliver as many cases as the Respondent deemed appropriate. The number of cases they delivered went up, and so did their commissions.

The Respondent claims entitlement to an offset against backpay for a productivity credit, based on the additional commissions received by presell drivers vis-à-vis their commissions before April 15, 1991. In this regard, Ferguson testified that the presell drivers were assigned additional helpers after April 15, 1991, and therefore did not work additional hours. However, O'Dwyer, who was a presell driver between 1987 and 1994, and Dennis, who was a presell driver from 1989 until 1994, testified that they worked additional hours after April 15, 1991. Further, O'Dwyer stated there was no difference in the frequency of his being assigned a helper before and after April 15, 1991, while Dennis was uncertain. Both O'Dwyer and Dennis testified that the Respondent assigned them routes over which they had no control, and that after April 15, 1991, they were required to make more stops and deliver more product. The General Counsel seeks backpay equal to $8.33 per hour worked, arguing that presell drivers had to deliver additional cases in an 8-hour day in order to make up for the elimination of the hourly rate.

Analysis and Conclusions

Even if the presell drivers were not required to work additional hours after April 15, 1991, their working conditions clearly became more onerous. Thus, on a daily basis, they had to make more stops and deliver more product; any additional commissions they received were based solely on their delivering more product to more customers.

In *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989), the Board, citing *United Aircraft Corp.*, 204 NLRB 1068, 1073 (1973), stated, "[A] backpay claimant who chooses to do the extra work and earn the added income made available on [an] interim job may not be penalized by having the extra earnings deducted from the gross backpay owed by the Respondent." See *Tualatin Electric, Inc.*, 331 NLRB 36, 44 (2000).

Here, the performance of extra work was not voluntary. The presell drivers were required to deliver more cases to more customers in order to earn the same amount of money they had earned before the Respondent unlawfully implemented its new system of compensation. To penalize them now for having had to work harder because of the Respondent's violations of the Act would be to condone the Respondent's commission of unfair labor practices. I categorically reject such an outcome and conclude that the General Counsel did not act unreasonably in determining that the Respondent is not entitled to any offset for its so-called productivity credit.

II. Bulk Drivers

The expired contract had no bulk driver classification.[8] At the time of the implementation, the Respondent instituted bulk driver as a new classification. The three drivers who encumbered this position were compensated at a straight hourly rate of $12 or $14 an hour, with no commissions for cases delivered. The General Counsel has concluded that the position of bulk driver was akin to that of presell driver, thereby entitling bulk drivers to the commissions due presell drivers. The Respondent, on the other hand, contends that these bulk drivers were more like freight drivers.

The most reliable witness on the matter of the responsibilities of bulk drivers vis-à-vis presell drivers was Radulski, who was hired as a bulk driver in April 1992 at $12 an hour with no commissions. He became a presell driver on about June 30, 1998. He testified credibly and without controversion that as a bulk driver and as a presell driver, he did almost everything identically and filled out identical paperwork. Compared to what he did as a bulk driver, the only differences in the performance of his work as a presell driver are that he drives a bigger truck, generally has smaller accounts, and handles the product somewhat differently.

Analysis and Conclusions

Based on Radulski's testimony and the record as a whole, I cannot conclude that the General Counsel acted unreasonably in determining that bulk drivers should be treated as presell drivers in terms of the Respondent's backpay obligations and are entitled to commissions similarly computed. Even accepting the Respondent's argument that the bulk drivers should have been considered freight drivers, the DDOM contract expressly provided that freight drivers receive commissions. I conclude, therefore, that the bulk drivers should receive commissions as computed by the General Counsel.

III. Holiday Pay

Baines testified that the language in the expired DDOM contract providing for holiday pay [9] was ambiguous, documentation provided by the Respondent was inconsistent and not always complete, and the practice in effect was not in sync with the contractual language. Thus, while the contract provided a special hourly rate for driver-sold drivers of $14.80 and driver-sold helpers of $14.70, all drivers and helpers apparently received the same rate. There was also language providing that certain seniority employees hired before May 1, 1987, were to receive a bonus of double pay for certain holidays. However, Baines testified, he had difficulty determining who was eligible, and there was no agreement on this between the Respondent and the Union. Indeed, he testified, the Respondent and the Union could not agree on the amounts of holiday pay other employees should receive.

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[8] It did provide for freight drivers, who were to be paid an hourly rate plus "appropriate commissions for full and empties, whichever is greater." Ibid. As earlier noted, prior to unlawful implementation, the Respondent had no employees classified as regular freight drivers.

[9] Jt. Exh. 1, article XII.

At the hearing, the General Counsel modified the backpay due for holiday pay for certain employees, because information provided by the Respondent indicated they were not eligible for double pay. The Union agreed that certain employees were credited with too much holiday pay but contended that certain other employees were not credited with enough. However,

Baines testified that he increased holiday pay for those employees whom the Union contended were under-credited. He stated he modified his calculations both because of the uncertainty of the practice of the parties and because he had to convert the Respondent's yearly record system to the Board's quarterly backpay system.

The sole issue now raised by the Respondent is whether the General Counsel erred by calculating floating holidays at double-time rate rather than straight-time rate.[10] The Union does not contest the General Counsel's calculation of holiday pay.[11]

Analysis and Conclusions

As noted earlier, backpay calculations are often not susceptible to precision, and the General Counsel is required only to calculate a reasonable backpay specification, appropriately resolving uncertainties in favor of the backpay claimant. Moreover, it was appropriate for the General Counsel, in attempting to reconstruct as accurately as possible the holiday pay owed to the discriminatees, to consider past practice and the information and arguments presented by the parties.

I conclude that, objections from the Respondent notwithstanding, the General Counsel did not act unreasonably or improperly in computing holiday pay figures, including floating holidays, and that such figures should therefore be accepted.

IV. Medical Reimbursement

Baines testified that the documentation provided by the Respondent was inadequate to make an accurate computation and that there was no agreement between the Respondent and the Union on this issue. At the hearing, the Respondent conceded that it owed more money than was sought in the original compliance specification. The Union, however, disputed both the General Counsel's and the Respondent's calculations.

At the hearing, Baines amended the specification by using the Respondent's figures when they were beneficial to the employee but keeping the original figures for other employees.
The Respondent does not presently contest the Region's computation of what it owes in reimbursement of medical costs.[12] With two exceptions, the Union concedes that the recalculated amounts are supported by the Respondent's records (R. Exh. 27).[13] The Union contends that the Respondent furnished inadequate documentation regarding employees Brian Dryps, Greg Ratliff, and John Thomson Jr., and failed to provide proof

[10] R. Br. at 5–6.
[11] U. Br. at 38.
[12] R. Br. at 4.
[13] U. Br. at 39.

that 27 employees exercised their right to opt out of medical coverage.[14]

Analysis and Conclusions

The Union provided no evidence, either testimonial or documentary, to rebut the calculations made by the General Counsel. Ideally, specific documentation pertaining to the employees referenced by the Union would have been provided. However, the General Counsel attempted in dealing with the element of medical reimbursement to arrive at reasonable figures and was satisfied with what the Respondent did provide. In this regard, Baines used the Respondent's figures when they benefited employees but kept the original figures for other employees.

I cannot conclude in these circumstances that the General Counsel acted unreasonably or arbitrarily in attempting to determine, as best as possible, the medical costs reimbursement owed to discriminatees. Therefore, I accept the General Counsel's computations in this area.

V. Voluntary Payment and its Apportionment

The General Counsel has agreed with the Respondent that its voluntary payments made to certain warehouse employees in November 2000, totaling $423,922.28, should be an offset to backpay owed.

The General Counsel divided the payment into principal and interest that would have been due at the time the payment was made. Thus, Baines testified that he applied the voluntary payment using the month that it was paid as if the Board had administered the payment process. Since interest is due and owing on backpay owed by the Respondent, he determined that part of the payment made in November 2000 should be interest. He testified in detail about the methodology he used in computing the division of payment into principal and interest.

The Respondent contends that all of the amount of the voluntary payment should be applied as principal, none as interest. The Respondent bases this largely on its premise that interest should be tolled as of June 1,1999, an argument I have rejected.

The Union contends that the payments were made without approval of the Region and in non-compliance with Board guidelines (Secs. 10635.1 and 10635.2 of the Case Handling Manual for Compliance Proceedings). Therefore, the Union argues, they should be properly considered non-deductible as a form of gift.[15] The Union also objects to the allocation between interest and principal used by the General Counsel.

Analysis and Conclusions

I reject the Union's argument that the payments should be treated as a gift and not as deductible interim earnings. The paramount principle in compliance proceedings is to make employees "whole" for the unfair labor practices committed against them, not provide them with additional financial enrichment beyond that. Not giving the

[14] Id. at 39–40.
[15] U. Br. at 34.

Respondent credit for the payments it made would result in a "windfall" to employees neither contemplated nor authorized by the Act.

As the General Counsel points out in its brief (at 17), even accepting the Respondent's position regarding tolling, there was still considerable interest owing on backpay from April 15, 1991. In any event, I have concluded that interest on backpay should not be tolled as of June 1, 1999, and that the Respondent's backpay obligation continued thereafter. The General Counsel's apportion of principal and interest from April 15, 1991 until November 2000, when the voluntary payment was made, is eminently reasonable, and I accept it, over objections from the Respondent and the Union that it was improperly computed.

VI. Workers Compensation Payments

The Respondent furnished evidence that three employees[16] received workers' compensation payments during the backpay period for job-related injuries, and the General Counsel agreed to give the Respondent credit for these payments. Although the Union objected, it did not present any contrary evidence. It contends, however, that the General Counsel did not correctly calculate the workers' compensation offsets, citing *American Mfg. Co.*, 167 NLRB 520, (1967).[17]

Analysis and Conclusions

American Mfg. Co. does not set out a specific formula for offsetting workers compensation payments. Although the Union's interpretation of how the offset should be calculated may well be a permissible one, the General Counsel is free to adopt a contrary interpretation that is not unreasonable or arbitrary; in other words, its computations need only be supportable. I cannot conclude that the General Counsel's formulation of the workers compensation offsets was impermissible and, accordingly, I accept it.

Conclusion

For the reasons I have stated, I accept the final backpay specification in all respects. For the sake of the over 300 discriminatees, the bargaining unit as a whole, and the existing collective-bargaining relationship between the Respondent and the Union, I offer my hopes that compliance can be concluded as soon as possible.

On the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

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[16] Michael Lozano, David Nelson, and Dan Newman. See R. Exh. 36.

[17] U. Br. at 29–33.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

IT IS HEREBY ORDERED that Respondent Hubert Distributors, Inc., Pontiac, Michigan, its officers, agents, successors, and assigns, shall pay the individuals named in the Appendix the indicated amounts of total gross backpay and other reimbursable sums for the period from April 15, 1991 to June 30, 1998,[19] with interest as prescribed in *New Horizons for the Retarded*,

[19] I adopt and incorporate by reference the amounts set forth in GC Exh. 20, attached as the Appendix.

283 NLRB 1173 (1987), accrued to the date of payment and minus tax withholding required by law.

Dated, Washington, D.C. December 16, 2003

IRA SANDRON
Administrative Law Judge

APPENDIX GC Exh. 20 pages 1-8